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No. 1038

IN THE

Supreme Court of the United States

October Term, 1946

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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Dated February 14, 1947.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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Potomac Electric Power Company respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia. The judgment affirmed an order of the District Court of the United States for the District of Columbia, entered January 29, 1945 (R. 261), that affirmed an order of the Public Utilities Commission of the District of Columbia, entered July 22, 1944 (R. 1), reducing the Company's rates.

OPINIONS BELOW

The opinion and order of the Commission (R. 1) is reported in 55 P. U. R. (NS) 65.

The findings of the District Court (R. 262) are not reported.

The three opinions in the Court of Appeals (R. 641) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (R. 657) was entered on July 16, 1946. A petition for rehearing (R. 658), seasonably filed, was denied on December 17, 1946 (R. 669).

The jurisdiction of this Court is invoked under Par. 65 of the Law creating the Public Utilities Commission (D. C. Code 43-705, 37 Stat. 989, 49 Stat. 882), and under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., § 347).

STATUTE INVOLVED

Pertinent portions of the Act creating the Public Utilities Commission (D. C. Code 43-101-1007) are copied in the Appendix.

QUESTIONS PRESENTED

1. Is the rate-making scheme in the District for changes in public utility rate levels previously established by the compromise method of the "sliding scale" to remain obscured by the differing opinions of the three judges in the court below, in lieu of respecting the clear purpose of the Congress that changes by that method are attainable only through the compromise procedure of mutual agreement?

2. Apart from 1 above, and granted a Congressional purpose that valuation be prerequisite to non-consensual rate-making in the District, as had been settled by previous decisions of the court below, is that Congressional purpose overturned by the holding of the *Hope* and *Natural Gas Pipeline* cases[1] that the Congress constitutionally may, where it wishes, authorize rate-making without valuation?

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[1] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942).

STATEMENT

1. Historical Background

In creating the Commission in 1913, the Congress empowered it to regulate rates. It was directed to value the property of the utility at current fair value (Par. 7), for the evident purpose of providing a basis for the permissible rate order. But English precedent, adopted for a time in Massachusetts, afforded a simpler alternative, based on incentive rather than litigation, known loosely as the "sliding scale". The Congress accordingly empowered the Commission not only to fix rates unilaterally on a valuation basis, but also to settle by agreement with the utility on any incentive plan that might be "practicable and advantageous to the parties interested" (Par. 18).

Early efforts by the Commission on a valuation basis led to such difficulties that, even by 1924, no solution had been found. So the Commission and the Petitioner, exploring the possibilities of compromise under Par. 18, agreed on a particular formula for a semi-automatic annual redetermination of rates. In essence, this provided for an annual reduction of rates by half the excess of net income over an approved rate of return on an agreed rate base, including among operating costs an agreed provision for depreciation, the remaining half of any excess net income to remain with Petitioner as an incentive to further investment and efficiency of service.

This arrangement, with occasional changes in its component terms by mutual agreement, including successive reductions of the rate of return, remained in effect until 1943, when the present controversy arose. It is undisputed that during this 19-year period rates were steadily reduced, from a level materially above, to a level materially below, the national average, and Petitioner continuously improved its service and credit.

2. The Proceeding in the Commission

In 1943 the Commission instituted an investigation to determine whether it should make "modifications of the basic elements of the existing arrangement" (R. 250). In this investigation the Commission made no effort at a new valuation but at all times asserted, and professed to exercise, a power to change the agreed sliding scale arrangement in any respect, however important, without compliance with regular rate-making requirements (R. 44, 45). This was on the theory that, once given an agreement on any particular formula under Par. 18, the Commission might thereafter impose any other formula, however different, against the opposition of the utility and without satisfaction of regular rate-making requirements.

By such procedure, the Commission entered an order reducing rates by a million dollars a year, as a result of lopping off 25 million dollars from the 106 million dollar rate base and changing each of the other fundamental terms of the formula. A new formula being thus promulgated by unilateral action, the Company at once rejected it in an application for reconsideration (R. 246) and, upon its denial, moved for redress in the courts.

3. Action of the Courts Below

The District Court affirmed the Commission with a brief opinion (R. 262) that does not discuss the major questions, but goes mainly on the ground that the Petitioner "has not withdrawn from the sliding-scale arrangement and is bound thereby" (R. 263).

This conclusion, if puzzling, seems clear in comparison with the situation now existing as a result of the three differing opinions of the three Judges who sat in the Court of Appeals.

On the first of the two questions here presented, Judge Edgerton was content to dismiss Petitioner's contention that an agreed compromise might not be changed by the Commission except through resort to regular rate-making powers, admittedly always available, on the short, though unexplained, ground that "The plain language of Par. 18 answers this argument." (R. 645)

Judge Clark was less categorical. He was impressed by the view that such a result would give the utility a veto over sliding scale changes and would conflict with the reserved power of the Commission under Par. 18 to make "other and further changes". But hesitating to rest his decision on this view, he went on to say that the Commission might reach the same result "under its general powers" (R. 647). From that point of view, it seemed necessary to buttress the first point, though he thought it might at any rate be adhered to now since Petitioner's "time for withdrawal from the 'sliding scale' arrangement has long since past" (R. 648, *sic*), thus implying that utilities in general may veto unilateral sliding scale changes if they do so promptly, and are able to tell when the time for promptness begins. But as a practical guide for the rate-making process, this rule has many cloudy terms, for it is difficult to see how any one could have opposed the Commission's action more vigorously or continuously than Petitioner (R. 10, 17-18), or how any one could have rejected the result more promptly or unequivocally (R. 246). Going back then, perhaps by virtue of these circumstances, to the view that the Petitioner might even "at this late hour" still be entitled to withdraw from the compromise arrangement, Judge Clark recurred to his second ground that "the Commission's general powers are quite sufficient" (R. 648). The rest of his opinion is given to a succession of possible positions on that question, summarized below.

Judge Miller, basing his decision on the history and policy of the sliding scale provision, was emphatic in his conclusion that, while the Commission always retains authority to change rates outside an agreed compromise by virtue of its general regulatory powers, it could not change rates within an agreed compromise unless by consent of the other contracting party (R. 651, 653).

On the second of the two questions here presented, Judge Edgerton felt entitled to disregard the Congressional intention, established not by the express terms of the Act but by its Congressional history and prior decisions of the same court, that current valuation be a condition precedent to non-consensual rate-making in the District. He felt entitled to do this, and indeed required, by the decisions of this Court in the *Hope* and *Natural Gas Pipeline* cases. Forgetful that the question there was the constitutionality of a declared Congressional will for rate-making without valuation, he erroneously thought that "The Supreme Court has decided that a statutory provision for finding 'fair value' does not require use of 'fair value' in fixing rates" (R. 645-6), and thus came to the conclusion that the finding itself, being not destined for use, might be omitted.

Judge Clark, while not explicit on this point, was evidently governed by the same misconception, for as pointed out in the dissent of Judge Miller,

> "... in spite of what seems to be the apparent and logical meaning of paragraphs 6 and 7, and in spite of the prior pronouncements of this Court . . ., the majority of the Court feel themselves bound in this case by the *Natural Gas Pipeline* and *Hope* cases." (R. 655)

Though feeling "bound" by those decisions, Judge Clark moved on to two additional grounds, first suggesting that the 1924 figure (accepted as a compromise rate base in lieu of valuation) plus net subsequent additions at cost was a

compliance with Par. 7, though it requires a valuation of property "at the fair value thereof at the time of said valuation", and next suggesting that the Commission did in fact here "take valuation evidence into account" (R. 650), though the Commission did not purport to make any finding of value or to use the concept of value as a step in its reasoning, but indeed expressly repudiated value as a guide (R. 18-19). In the end, Judge Clark, like Judge Edgerton, thought that matters of procedure were unimportant short of confiscation (R. 645 and 650).

Judge Miller, for his part, saw that this was a misconception of the *Hope* and *Natural Gas Pipeline* cases. They, he said,

> ". . . arose under the Natural Gas Act, which contains no standards except that rates be just and reasonable. There is in that Act no equivalent of paragraphs 6 and 7 of the District statute here under consideration. It does not require the Commission to proceed in any particular manner in determining rates; it contains no mandate as to how a rate base should be established.
>
> ". . . In the presence of definite, specific statutory standards, the principle of the *Pipeline* and *Hope* cases does not apply, and any commission action which does not observe those standards is invalid if it harms, even if it does not confiscate.
>
> ". . . when a Commission proceeds in defiance of its governing statute, its action amounts to unauthorized regulation. Unauthorized regulation is unlawful, if the utility is deprived of its property, even though the deprivation is short of confiscation." (R. 655-6)

As a result, the order of the District Court, and thus of the Commission, was affirmed, though on grounds that leave wholly indeterminable the power of the Commission for the future and discard the will of Congress under a misconception of the doctrine laid down by this Court in the *Hope* and *Natural Gas Pipeline* cases.

SUMMARY OF ARGUMENT

1. The compromise provisions of sliding scale procedure do not authorize unilateral action.

The Congress, in authorizing compromise rate agreements in the District of Columbia as an alternative to the usual statutory procedure by valuation, could not have intended to confer on the Commission a unilateral privilege to change the essential terms of such agreements against the objection of the utility and without compliance with the regular rate-making procedure, for no utility, in such event, would ever compromise. The Commission's action here was an assertion, for the first time, of just such a power. It is important that this question be distinctly decided so as to provide a workable basis for regulation in the future, but the three differing opinions of the Court of Appeals below leave it clouded in serious uncertainties.

2. The will of the Congress can not be disregarded on the ground that it might have done something different.

Valuation is required by the Act as a prerequisite to rate-making in the absence of compromise, though not in terms, yet by legislative history and uniform interpretation. This purpose of the Congress was discarded by a majority of the Court of Appeals on a misapplication of the *Hope* and *Natural Gas Pipeline* decisions that the legislative will is to be sustained, as against Constitutional attack, even without requiring valuation. The implication that Federal doctrine necessitates rejection of the legislative will where it does require valuation threatens to unsettle and confuse the regulatory process on an important matter, not alone in the District, but also in twelve States having statutes in similar form.

ARGUMENT

1. The Compromise Provisions of Sliding Scale Procedure Do Not Authorize Unilateral Action.

There was no reason why the Congress, having given the Commission full powers for rate-making by conventional methods, should, by an elliptic clause in its authorization for compromise agreements, give the Commission an unlimited privilege for rate-making without agreement and without satisfaction of the ordinary rules. On the contrary, there was every reason why the Congress, dealing with a practical situation and trying for a practical remedy, should intend just the opposite, for no sane utility management could be expected to make any compromise arrangement under Par. 18 if by doing so it would surrender all safeguards of regular rate-making practice. It is trite to say that legislation is to be interpreted to advance the remedy, but important to do so when its disregard will paralyze the statutory scheme.

But there may be one step worse, and, if so, it is illustrated here. Worse than paralysis of the statutory scheme may be the impossibility of determining whether such be the case or not. Yet it is under just such uncertainty that the regulatory powers of the Commission must be exercised in the future if the decision below is to remain in effect. Here for the first time was an assertion by the Commission of a special power, an exemption from the rate-making routine, unexpectedly available in the case of every utility that had tried to work out its rate problems on a businesslike basis. Unexpectedly, we say, because the Commission had theretofore uniformly recognized that any sliding scale arrangement might be terminated on reasonable notice by either party.[3] It had been recognized in effect

[3] *Re Washington Gas Light Co.*, 11 P. U. R. (NS) 469, 471, 478 (1935); People's Counsel at the time so recognized: Roberts, *How the "Sliding Scale" Reduces Rates* (1936) 18 P. U. Fort. 11.

by the court below in stressing the consensual nature of any sliding scale arrangement.[3]

It was important for the orderly and efficient operation of the District Government that such a novel assertion be disposed of distinctly by the court below, in terms unequivocally rejecting it, as Petitioner thinks right, or at least unequivocally accepting it, so that the Commission and the industry might thereafter know the basis for their arrangements and proceedings. The court below did neither. The polar difference between Judge Edgerton and Judge Miller, and the indecision of Judge Clark, leave the law indeterminable, though on an important point in the administration of public affairs.

2. The Will of the Congress Can Not Be Disregarded on the Ground That It Might Have Done Something Different.

The constitutional problems implicit in utility rate-making were first recognized in terms of a permissible return on the value of the property employed. That is, no doubt, a difficult and variable concept. Evidence of various kinds is pertinent to its determination. They were catalogued, in time, by this Court in *Smyth* v. *Ames,* 169 U. S. 466 (1898).

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[3] "In operation such a sliding scale plan gradually works towards a rate base valued at cost since additions to the property are recorded at cost; and in periods of continuously rising prices, such as have prevailed since 1935, the plan results in a rate base in each year of less than actual value at that time." *Washington Gas Light Co.* v. *Byrnes,* 78 U. S. App. D. C. 107, 137 F. 2d 547, 549 (1943), aff. *Vinson* v. *Washington Gas Light Co.,* 321 U. S. 489 (1944).

"The principles of the sliding scale were the subject of careful consideration when it was proposed by the People's Counsel and accepted by the utility in 1935. Acceptance by the utility was necessary since the statute, District Code Section 43-306, required that the Commission value the property of a utility at its fair value and the sliding scale arrangement eventuates in the course of time in a cost valuation." *Id.,* at 556.

As a landmark in utility regulation, that decision had a wide influence through the country, and all the more so since that was a period when many States were, for the first time, enacting laws to govern the rate-making process. The statutes of twelve States, either in terms or by interpretation of the local courts, today require a determination of "value" as a pre-requisite to any rate-making order.[4] In a number of these statutes prudent investment is specifically negated as an exclusive test by requiring consideration of current reproduction costs and other elements of value.[5] While the details of the individual statutes are not presently of interest, the recognition of the legislative will in this type of statute presents a matter of general importance.

The Act, while not so in terms, was clearly intended as a statute of this type. Par. 7 requires the Commission to "value the property of every public utility . . . at the fair value thereof at the time of said valuation" and Par. 6 lists the main components of that "fair value", principally original cost and current cost of reproduction. These were not designed as a manual of exercises for the general education of the Commission. The Congress was concerned with doing a practical job in an efficient way. They were intended as rules for the rate-making process, to crystallize in a legislative formula the pronouncements in *Smyth* v. *Ames*. The final form of the Act was expressly chosen, in preference to a more general form, for just this reason. The

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[4]Ala. Code (1940) tit. 48, §52; Ind. Stat. Ann. (Burns, 1933) §54-203; Kans. Gen. Stat. (1935) §66-128; Ky. Rev. Stat. (1942) §278.290; Me. Rev. Stat. (1944) ch. 40, §16; 16 Mich. Stat. Ann. (1937) §22.157; N. M. Stat. Ann. (1941) §72-514; N. Y. Pub. Serv. Law (1939) §§49, 66(16), 114; N. C. Gen. Stat. (1943) §62-124; Ohio Gen. Code (Page, 1946) §614-46; 66 Penn. Stat. (Purdon, 1941) §1151; Wash. Rev. Stat. (Remington, 1933) §10441; see also Esser, *State Laws in Relation to the Hope Natural Gas Decision* (1944) 34 P. U. Fort. 69.

[5]Ala. Code (1940) tit. 48, §319; Ind. Stat. Ann. (Burns, 1933) §54-203; Ky. Rev. Stat. (1942) §278.290; N. M. Stat. Ann. (1941) §72-514; N. C. Gen. Stat. (1943) §62-124.

report of the Board of Commissioners of the District at the time of the enactment of the Act, and of the Senate Committee for the District reporting thereon,[6] explained the function of Par. 6 by reference to *Smyth* v. *Ames*, saying that under it "fair value . . . is 'the basis of all calculations as to the reasonableness of rates' ". When this choice was made on the floor of the Senate, it was made on the statement that Par. 6 related to the "question of fixing rates" and "the question of the determination of the rates that are to be charged".[7]

This unmistakable legislative will was honored through all time, both by the Commission, which set about to find "fair value" in its first rate case[8] (including as one of the elements current reproduction costs[9]), and by the Court of Appeals below.[10] It was, in due course, conceded as the

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[6]Sen. Rep. No. 300, 62nd Cong., 2d Sess. (1912) 2.

[7]48 Cong. Rec. 3019-20 (1912).

[8]*Re Potomac Electric Power Co.*, P. U. R. 1917D 563, 702.

[9]*Id.*, at 692-3.

[10]"The principal object of valuation, of course, is to provide a rate base, and the statute clearly contemplates that the commission shall ascertain the value as of 'the time of said valuation,' and not as of some anterior date." *Potomac Electric Power Co.* v. *Public Utilities Commission*, 51 App. D. C. 77, 276 Fed. 327, 329 (1921), app. dism., *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428 (1923).

"We are of the view, therefore, that the present cost of reproduction is one of the necessary elements for consideration, along with other relevant facts, in fixing the fair and reasonable value of the property. The law deals with existing conditions and not with abstract theories." *Id.*, at 330.

law[11] and finally confirmed by this Court.[12]

So, when this case reached the Court of Appeals below, it was settled law that the Act, like the acts of a number of the States, defined a formula for rate-making in terms of a return on value to be determined by consideration of numerous elements including current reproduction costs.

It was just this Congressional purpose that the Court below discarded on the basis of its misconception of this Court's decision in the *Hope* case. The Natural Gas Act, in issue in that case, provided, *simpliciter*, that all rates should be "just and reasonable"[13] and that the Commission might determine the "just and reasonable" rate.[14] As the Court said:

> "Congress . . . has provided no formula by which the 'just and reasonable' rate is to be determined." (320 U. S. at 600)

So the Court held that:

> "Under the statutory standard of 'just and reasonable', it is the result reached not the method employed which is controlling . . . If the total effect of the rate order cannot be said to be unjust and unreasonable,

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[11]"The company appealed to the Supreme Court of the District, which held that this method of computing reproduction cost was unlawful, being in violation of the express terms of the statute, which requires the value to be determined as of the date of the valuation. The commission's valuation was accordingly set aside, and, it is now conceded that this ruling was correct. Potomac Electric Power Co. v. Commission, 51 App. D. C. 77, 276 F. 327." *Public Utilities Commission* v. *Capitol Traction Co.*, 57 App. D. C. 85, 17 F. 2d 673, 674 (1927).

[12]"For the purpose of its functions, the Commission is directed to value 'the property of every public utility in the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation.' " *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, 491 (1944).

[13]Section 4(a), 15 U. S. C., §717c.

[14]Section 5(a), 15 U. S. C., §717d.

judicial inquiry under the Act is at an end." (*id.*, at 602)

All that means is that the Congress constitutionally may forego a valuation formula, not by any means that the courts constitutionally may disregard a valuation formula that the Congress has prescribed. This is emphasized in the related cases:

> *"The Constitution* does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, *within the ambit of their statutory authority,* to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, *proper findings made and other statutory requirements satisfied,* the courts cannot intervene . . ." (*Federal Power Commission* v. *National Gas Pipeline Co.,* 315 U. S. at 586; italics supplied)

> "Where Congress, as here, fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. *If Congress had prescribed a formula it would be the duty of the Commission to follow it.* (*Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U. S. 581, 589 (1945); italics supplied)

A number of State tribunals had held that the enlargement of Constitutional horizons made by these decisions of this Court did not change the legislative intention embodied in their several statutes.[15]

The decision of the Court of Appeals below, as an au-

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[15] *Peoples Natural Gas Co.* v. *Pennsylvania Public Utility Commission,* 153 Pa. Super. 475, 34 A. 2d 375, 382 (1943); *Northern States Power Co.,* v. *P. S. C.,* 73 N. D. 211, 13 N. W. 2d 779 (1944); *The East Ohio Gas Co.* v. *City of Cleveland,* 56 P. U. R. (NS) 73, 79 (1944); *Re The Montana Power Co.,* 56 P. U. R. (NS) 193, 216-7

thoritative Federal tribunal purporting to apply Federal doctrine proclaimed by this Court, threatens to unsettle and confuse the regulatory situation in all these States and in the others having similar statutes, by its implication that some supervening Federal doctrine justifies disregard of the legislative will. This result is, of course, in conflict with the real doctrine of the *Hope* and *Natural Gas Pipeline* decisions. They were concerned to enforce, not to frustrate, the legislative will.

The dispensation so given by the Court of Appeals from the performance of the administrative function enjoined by statute is aggravated by a further circumstance. Under an "end result" doctrine the Court of Appeals felt authorized to say, on administrative findings other than those prescribed by statute, that the result may be deemed reasonable just as if the prescribed findings had been made. This transgresses the line of division between administrative function and judicial review. If an administrative order is not valid on the grounds on which it was rested by the administrative agency, it can not be validated on other factual grounds, not found by the commission or relied on by it (*Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 1943). To say so is to assume what the Commission would have done had it done something other than what it did and thus to substitute the initial judgment of the court for that of the chosen agency, on a judgment matter requiring an appraisal of specialized and complicated facts.

The decision of the Court of Appeals below is, therefore, a decision of a Federal question in conflict with applicable decisions of this Court. It is a misapplication of this Court's decisions to a different type of statute. The conflict is of a

(1944); *City of Long Branch* v. *Monmouth Consolidated Water Co.*, 57 P. U. R. (NS) 104, 111 (1945); and compare *Utah Power and Light Co.* v. *P. S. C.*, 107 Utah 155, 152 P. 2d 542, 553-4 (1944).

particularly serious sort, since it sets aside a legislative purpose and undermines the administrative process. It was not for the court below to substitute its notions of policy for those of the Congress or to dispense with administrative action stipulated by the Congress. These errors were in a matter of general concern, both as to geographical distribution, and as to intrinsic nature and as to frequency of occurrence. For the first, this type of statute exists not in the District alone, but also in a quarter of all the States. For the second, rate regulation is of interest to the whole economy. For the last, the problems of rate regulation recur persistently, since the conditions of the enterprise are in constant change. Their intricacy is such as to require much time and effort for their appraisal. It is, therefore, of particular concern for the orderly operation of the Government and business that the pattern of review be clearly established, and thus be known at the outset of regulatory action rather than discovered after years of exploratory litigation. The decision of the majority of the Judges in the court below may well lead to confusion and delay through wide areas of this important field. These evils will be dispelled by a pronouncement from this Court.

CONCLUSION

We respectfully submit that a writ of certiorari should be granted.

Dated February 14, 1947.

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APPENDIX

Excerpts from the Law Creating the Public Utilities Commission of the District of Columbia.

Par. 2. That every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. The charge made by any such public utility for any facility or services furnished, or rendered, or to be furnished or rendered, shall be reasonable, just, and nondiscriminatory. Every unjust or unreasonable or discriminatory charge for such facility or service is prohibited and is hereby declared unlawful. Every public utility is hereby required to obey the lawful orders of the commission created by this section.

. . . . . .

Par. 6. That the commission shall ascertain, as soon and as nearly as practicable, the amount of money expended in the construction and equipment of every public utility, including the amount of money expended to procure any right of way; also the amount of money it would require to secure the right of way, reconstruct any roadbed, track, depots, cars, conduits, subways, poles, wires, switchboards, exchanges, offices, works, storage plants, power plants, machinery, and any other property or instrument not included in the foregoing enumeration used in or useful to the business of such public utility, and to replace all the physical properties belonging to the public utility. It shall ascertain the outstanding stock, bonds, debentures, and indebtedness, and the amount, respectively, thereof, the date when isued, to whom issued, to whom sold, the price paid in cash, property, or labor therefor, what disposition was made of the proceeds, by whom the indebtedness is held, so far as ascertainable, the amount purporting to be due thereon, the floating indebtedness of the public utility, the credits due the public utility, other property on hand belonging to it, the judicial or other sales of said public utility, its property or franchises, and the amounts purporting to have been paid, and in what manner paid therefor, and the taxes paid thereon. The commission shall also

ascertain in detail the gross and net income of the public utility from all sources, the amounts paid for salaries to officers and the wages paid to its employees, and the maximum hours of continuous service required of each class. Whenever the information required by this paragraph is obtained it shall be printed in the annual report of the commission. In making such investigation the commission may avail itself of any information in possession of any department of the Government of the United States or of the Commissioners of the District of Columbia.

Par. 7. That the commission shall value the property of every public utility within the District of Columbia actually used and useful for the convenience of the public at the fair value thereof at the time of said valuation.

Par. 8. That before final determination of such value the commission shall, after notice of not less than thirty days to the public utility, hold a public hearing as to such valuation in the manner hereinafter provided for a hearing, which provisions, so far as applicable, shall apply to such hearing. The commission shall, within ten days after such valuation is determined, serve a statement thereof upon the public utility interested, and shall file a like statement with the District Committees in Congress.

Par. 9. That the commission may at any time, on its own initiative, make a revaluation of the property of any public utility.

. . . . . .

Par. 18. That nothing in this section shall be taken to prohibit a public utility, with the consent of the commission, from providing a sliding scale of rates and dividends according to what is commonly known as the Boston sliding scale, or other financial device that may be practicable and advantageous to the parties interested. No such arrangement or device shall be lawful until it shall be found by the commission, after investigation, to be reasonable and just and not inconsistent with the purposes of this section. Such arrangement shall be under the supervision and regulation of the commission. The commission shall ascertain, deter-

mine, and order such rates, charges, and regulations, and the duration thereof, as may be necessary to give effect to such arrangement, but the right and power to make such other and further changes in rates, charges, and regulations as the commission may ascertain and determine to be necessary and reasonable, and the right to alter or amend all orders relative thereto, is reserved and vested in the commission notwithstanding any such arrangement and mutual agreement.

. . . . . .

Par. 65. The District Court of the United States for the District of Columbia shall have jurisdiction to hear and determine any appeal from an order or decision of the commission. Any public utility, or any other person or corporation affected by any final order or decision of the commission, other than an order fixing or determining the value of the property of a public utility in a proceeding solely for that purpose, may, within sixty days after final action by the commission upon the petition for reconsideration, file with the clerk of the District Court of the United States for the District of Columbia, a petition of appeal setting forth the reasons for such appeal and the relief sought; at the same time such appellant shall file with the commission notice in writing of the appeal together with a copy of the petition. Within twenty days of the receipt of such notice of appeal the commission shall file with the clerk of the said court the record, including a transcript of all proceedings had and testimony taken before the commission, duly certified, upon which the said order or decision of the commission was based, together with a statement of its findings of fact and conclusions upon the said record, and a copy of the application for reconsideration and the orders entered thereon: *Provided,* That the parties, with the consent and approval of the commission, may stipulate in writing that only certain portions of the record be transcribed and transmitted. Within this period the commission or any other interested party shall answer, demur, or otherwise move or plead. Thereupon the appeal shall be at issue and ready for hearing. All such proceedings shall have precedence over any civil cause of a different nature

pending in said court, and the District Court of the United States for the District of Columbia, shall always be deemed open for the hearing thereof. Any such appeal shall be heard upon the record before the commission, and no new or additional evidence shall be received by the said court. The said court, or any justice or justices thereof, before whom any such appeal shall be heard, may require and direct the commission to receive additional evidence upon any subject related to the issues on said appeal concerning which evidence was improperly excluded in the hearing before the commission or upon which the record may contain no substantial evidence. Upon receipt of such requirement and direction the commission shall receive such evidence and without unreasonable delay shall transmit to the said court the findings of fact made thereon by the commission and the conclusions of the commission upon the said facts.

Upon the conclusion of its hearing of any such appeal the court shall either dismiss the said appeal and affirm the order or decision of the commission or sustain the appeal and vacate the commission's order or decision. In either event the court shall accompany its order by a statement of its reasons for its action, and in the case of the vacation of an order or decision of the commission the statement shall relate the particulars in and the extent to which such order or decision was defective.

Any party, including said commission, may appeal from the order or decree of said court to the Court of Appeals of the District of Columbia, which shall thereupon have and take jurisdiction in every such appeal. Thereafter the Supreme Court of the United States may, upon a petition for certiorari granted in its discretion, review the said case.

Said commission shall not, nor shall any of its members, officers, agents, or employees, be taxed with any costs, nor shall they or any of them be required to give any supersedeas bond or security for costs or damages on any appeal whatsoever. Said commission, or any of its members, officers, agents, or employees, shall not be liable to suit or action or for any judgment or decree for any damages, loss, or injury claimed by any public utility or person, nor re-

quired in any case to make any deposit for costs or pay for any service to the clerks of any court or to the marshal of the United States.

Par. 66. In the determination of any appeal from an order or decision of the commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the commission shall be conclusive unless it shall appear that such findings of the commission are unreasonable, arbitrary or capricious.

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CLERK

No. 1038

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL., *Respondents*.

Brief of Respondent, Public Utilities Commission, in Opposition to Petition for Writ of Certiorari

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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COUNTER STATEMENT

On April 26, 1943, the Public Utilities Commission of the District of Columbia (hereinafter referred to as "Commission") issued an order of investigation to determine:

"1. Whether the sliding-scale method of electric rate regulation shall be abandoned.

2. Whether the sliding-scale method of electric rate regulation shall be continued in its present form or with modifications of the basic elements of the existing arrangement:
   (a) The rate base.
   (b) Rate of return.
   (c) Depreciation accruals.
   (d) Method of effecting rate reductions." (R. 1.)

On January 5, 1944, the Commission promulgated the usual order for annual investigation of rates under the provisions of the sliding-scale arrangement and on January 26, 1944, issued its Notice of Hearing in which it stated that the matters set forth in the orders of April 26, 1943, and January 5, 1944, would be consolidated for hearing. Pursuant to the said orders and the notice, formal public hearings were held on 33 days in the period from February 28, 1944, to May 9, 1944, inclusive. (R. 1-2.)

At no time did Petitioner contest the right of the Commission to investigate the provisions of the sliding-scale plan for the purpose of determining whether modification thereof should be made. The Petitioner participated fully throughout the hearing by cross-examination of witnesses and by offering evidence in its behalf. It offered testimony on various phases of the investigation. On the subject of the rate base, the Petitioner presented the testimony of the Vice-President of Stone & Webster Engineering Corporation, who presented a study of projected historical cost trends, which the witness contended was the present fair value of the property in the amount of $117,396,000. The witness did not contend that this fair value should be substituted for the existing rate base, nor did the Petitioner contend for such a valuation. (R. 17.)

When the Petitioner appealed from the judgment of the District Court, affirming the Commission's order, it did not

designate any of its testimony nor any part of the record dealing with factual determinations. It relied, in the court below, on the simple law questions relating to the powers of the Commission and contended that the Commission had no authority to modify the sliding-scale arrangement without the Petitioner's consent. (R. 267.) Therefore, the questions of the rate base, the amount of depreciation reserve or annual charges for depreciation, and the rate of return were not before the court below.

In the proceedings before the Commission, the Petitioner took the position that the sliding-scale arrangement, as then constituted, was fair to both consumers and to it and that it should not be changed. It indicated that if any of its provisions were modified "in such a way as to make the plan unacceptable" to it, then it "may withdraw from the plan." This position was not because of lack of power in the Commission to modify, but because the plan would no longer be a "mutual agreement." (R. 10.)

The Commission's order was promulgated July 22, 1944. The Petitioner waited until it filed its application for reconsideration on August 11, 1944, and for the first time stated that it rejected the sliding-scale arrangement as modified by the Commission under its order No. 2796. (R. 246.)

The Petitioner refers to the sliding-scale arrangement authorized by paragraph 18 of the act (37 Stat. 974, 980; Section 43-317, D. C. Code) as a compromise method of rate regulation. Paragraph 18 of the act does not authorize the Commission to compromise rate regulation. It specifically declares that no such arrangement shall be lawful until it shall be found by the Commission "to be reasonable and just and not inconsistent with the purposes" of the act. Paragraph 2 of the act (37 Stat. 977, Section 43-301, D. C. Code) prohibits every "unjust or unreasonable or discriminatory charge" for public utility service. That paragraph lays down the standard by which the Commission must be guided in all of its rate regulation. If any plan adopted under the au-

thority of paragraph 18 permitted charges that are unjust, unreasonable, or discriminatory, it would be inconsistent with the purpose of the act. It is obvious from the foregoing that no rate-making plan under paragraph 18 or any other provision of the act may be designated as a "compromise method" of rate-making. Congress did not designate the plan authorized by paragraph 18 as a compromise method.

On page 3 of its petition, the Petitioner stated that the arrangement entered into in 1924 remained in effect until 1943 with occasional changes in its component terms by "mutual agreement." Record page 7 shows that the plan was modified in 1931 by reducing the basic rate of return from 7½% to 7%. That modification was not made by "mutual agreement." In *Potomac Electric Power Co.* v. *Public Utilities Commission*, Equity No. 53475, (In the Supreme Court of the District of Columbia, now the United States District Court for the District of Columbia) the Petitioner brought suit to enjoin the Commission from reducing the basic rate of return on the same ground set forth in the first question presented in this petition. It contended in that court as it does here, that the Commission had no authority to modify the sliding-scale plan without the Petitioner's consent. In that case the court held that the Commission had jurisdiction "to alter or amend the existing sliding-scale arrangement." Notice of appeal to the United States Court of Appeals for the District of Columbia was noted but the appeal was not prosecuted.

The Commission again modified the plan in 1935 to reduce the basic rate of return to 6½% and in 1937 to 6%.

On page 3 of the petition it is stated that the sliding-scale plan provides for annual reduction of rates by half the excess of net income over an approved rate of return on "an agreed rate base." The plan itself set forth the method by which the rate base should be determined but the rate base determined by the Commission is not an agreed rate base, and, in fact, has ben challenged in minor particulars in nearly

every proceeding under the plan. The Petitioner further states that the remaining half of any excess net income "remains" with the Petitioner as an incentive to further investment and efficiency of service. This is half the fact. Under the plan no part of the excess income above the basic rate of return is ever refunded by the Petitioner. It retains the entire amount of the excess, but one-half of that amount is used as a measure to reduce rates in the following year.

On page 4 of its petition, the Petitioner said that in the investigation the Commission "made no effort at a new valuation," and on page 7 said that the Commission did not purport to make any finding of value or to use the concept of value as a step in its reasoning "but indeed expressly repudiated value as a guide." These statements are contrary to fact. On pages 18 to 22, inclusive, of the Record, the Commission sets forth its findings as to a rate base, including material and supplies. On Record page 19 the Commission said a rate base predicated upon original costs is fair to the utility, its investors and consumers because it gives recognition to every dollar actually invested in the property. The Commission then found that the electric plant component of the rate base shall be the original cost of property used and useful in public service at December 31, 1943. On page 21 of the Record, the Commission set forth the gross rate base both weighted and unweighted including materials and supplies. On page 22 of the Record, the Commission found that a depreciated rate base should be employed as one of the factors in the sliding-scale arrangement in the determination of rate adjustment for the year 1944 and thereafter.

On pages 22 to 26, inclusive, of the Record, the Commission discussed the testimony relating to the depreciation reserve and on page 26 made its finding of the depreciation reserve which it found constituted a fair and reasonable determination of the accrued depreciation for application in establishing a depreciated rate base under the modified sliding-scale plan. On page 42 of the Record, the Commission

shows its justification for reduction in rates and how the amount was determined. It there shows the rate base as determined from its findings hereinabove discussed, and set forth in footnote 6 thereon its determination of the rate base and the elements thereof.

On page 4 of its petition, the Petitioner states that the Commission professed to exercise a power to modify the sliding-scale arrangement without compliance with regular rate-making requirements, but it does not state what rate-making requirements the Commission did not satisfy. The Commission's Findings and Opinion (R. 1 to 44, inclusive) refute the assertions made by the Petitioner.

On page 4 of the petition it is asserted that the Commission reduced rates as a result of lopping off $25,000,000 from the $106,000,000 rate base. This statement is contrary to fact as shown by the Commission's findings. The Commission has never established a rate base of $106,000,000. The rate base established by the Commission for the year 1942 was approximately $100,000,000. This was an undepreciated rate base. The sliding-scale arrangement prior to its modification by Order No. 2796 also provided that the accrual for depreciation should be lessened by interest on the reserve balance calculated at the rate of 4% per annum to compensate, in part at least, for the use of an undepreciated rate base. (R. 4.) The Commission did modify the sliding-scale arrangement to provide for the use of a depreciated rather than an undepreciated rate base. (R. 22.) It also allowed as an operating revenue deduction the full amount of the depreciation accrual. (R. 26.) The net effect of this change on the return to the Company is something less than $300,000. The Petitioner's statement would lead the Court to believe that its return was reduced by $1,375,000. The reduction in rates ordered by the Commission was brought about in large part by the reduction in the rate of return from 6% to 5½%, as shown by Record page 42.

We believe that a better statement and understanding of the actions of the courts below are shown by the decisions of those courts (R. 262-264, 641-656) than the statement of Petitioner on pages 4 to 7 of its petition.

SUMMARY OF ARGUMENT

1. Paragraph 18 of the act permits a sliding-scale plan for rate-making that the Commission finds to be reasonable and just and not inconsistent with the purposes of the act. Any such plan is "under the supervision and regulation" of the Commission with "the right to alter or amend all orders relative thereto." The standard for rate-making is that rates be reasonable, just, and non-discriminatory. Such a standard preserves all the ordinary rules of rate-making and safeguards all rights of the utility. The Petitioner had notice and full opportunity to be heard on all points. It participated in the investigation and after the Commission's order was promulgated announced for the first time it rejected the modified plan.

Two Judges below held that the Commission had authority, under paragraph 18, to modify the plan without the Petitioner's consent to the modifiations. One Judge decided that the plan could be modified only by mutual agreement. The Commission first modified the plan in 1931 and the District Court upheld its right so to do. Two other modifiations of the plan have been made. The Petitioner did not complain below and does not complain here of the valuation fixed by the Commission nor of the rate of return allowed.

2. The investigation instituted by the Commission was not a proceeding under paragraph 6. That paragraph does not lay down a valuation formula nor establish a method of rate-making. The paragraph uses no word connoting valuation or rate-making. The "information" required by paragraph 6 is not the "components of fair value" and is not required in rate-making but is to be printed in annual reports to Congress. The principal elements of fair value under the Smyth v. Ames doctrine are not

required to be ascertained under the provisions of paragraph 6. Congress indicated a recognition that paragraph 6 did not establish a valuation formula.

The majority of the court below were clear in their separate decisions that paragraph 6 is not a rate-making formula and that the act does not require value to be predicated upon reproduction estimates. Local interpretation of a local statute will not confuse state courts in their interpretations of state statutes.

3. The decisions of the majority in the court below are not in conflict with other decisions of that court nor applicable decisions of this Court. Two Judges agreed that the Commission has authority, under paragraph 18 of the act, to alter or amend the sliding-scale. Their decision is in accord with a statement of this Court. Both agreed that paragraph 6 of the act does not establish a legislative formula and that the Commission was not required to establish a rate base predicated upon reproduction estimates. The questions raised by the Petitioner are not those indicated by this Court as grounds for issuing a writ of certiorari.

ARGUMENT

1. Paragraph 18 of the Act Authorizes the Commission to Alter or Amend Orders Authorized by the Paragraph.

In its argument, the Petitioner (page 9) states there was no reason why the Congress should give the Commission unlimited privilege for rate-making without satisfaction of the ordinary rules. Congress has not given the Commission an unlimited privilege in rate-making. Paragraph 18 provides that no arrangement authorized by it shall be lawfull until it shall be found by the Commission, after investigation, "to be reasonable and just and not inconsistent with the purposes" of the act. That is not an unlimited privilege. Paragraph 2 of the act establishes the standard that rates shall be reasonable, just, and non-discriminatory. To the extent that rates

may be established under the authority of paragraph 18, the Commission is limited by the standard set up in paragraph 2.

But the Petitioner does not advise the Court of any ordinary rules in rate-making that were not followed by the Commission in its investigation.

The Petitioner says no public utility management could be expected to make any compromise arrangement under paragraph 18 if by so doing it would surrender all safeguards of regular rate-making practice. The Petitioner has failed to point to a single safeguard that it did not have throughout the proceeding before the Commission. It had notice; it had opportunity to be heard; and was heard, fully, in cross-examination of witnesses, in the presentation of evidence through its own witness, and in argument by way of a written brief. In making its findings and in issuing its order, the Commission gave consideration to all of the ordinary rules of rate-making and afforded the Petitioner every safeguard to which it is entitled under the statute or under constitutional right. The Commission found the fair value as of December 31, 1943, and the fair rate of return the Petitioner is entitled to earn on the value of its property. The Petitioner did not complain in the court below, and is not complaining here, of a lack of fair return upon its investment for public service. It has had all the safeguards that the law requires.

The Petitioner says that the Commission's powers must be exercised in the future in uncertainty if the decision below is to remain in effect. The Commission has no uncertainty as to its powers because of the decision below. Judge Edgerton had no uncertainty in his mind that the Commission has authority to modify the sliding-scale plan when he said that paragraph 18, "expressly vests in the Commission full authority to change rates and regulations which have been embodied in a mutual agreement regarding a sliding-scale," and when he said that the plain language of paragraph 18 answers the Petitioner's argument. (R. 645.) There was no uncertainty in the mind of Judge Clark when he said that the Pe-

titioner's construction of paragraph 18 is "clearly against the obvious intent of Congress in passing this provision." (R. 647.) There was no uncertainty in the mind of Judge Miller when he dissented from the decision of the majority and said that paragraph 18 authorized an agreement, "which is entered into voluntarily by the utility." (R. 650.) There cannot be much uncertainty in the mind of the Petitioner about what the majority held because it seeks to have that decision reversed.

On page 9 of its argument the Petitioner says that here for the first time, the Commission asserted a special power of exemption from rate-making routine. This statement is contrary to fact. First, the Commission has claimed no exemption from rate-making routine. Its Findings and Opinion and Order show a consideration of and determination of every element required to establish just and reasonable rates. If the inference intended to be drawn from this statement is that the Commission for the first time asserted a right to modify the sliding-scale plan, that is also contrary to fact. In 1931 the Commission modified the then existing sliding-scale plan by reducing the basic rate of return from 7½% to 7%. The Petitioner appealed from that decision in *Potomac Electric Power Co.* v. *Public Utilities Commission*, Equity No. 53475 (Supreme Court of the District of Columbia, now the District Court of the United States for the District of Columbia) on the identical ground that it asks this Court to review and reverse the court below. In that case, the court said the Commission had jurisdiction "to alter or amend the existing sliding-scale arrangement." Notice of appeal to the Court of Appeals for the District of Columbia was noted but was not prosecuted. The Commission again modified the sliding-scale plan so as to further reduce the rate of return in 1935 and 1937.

The District Court has on two occasions, once in 1931 in Equity No. 53475 and again in the instant case, held that the Commission has authority under the provisions of paragraph

18 to alter or amend the sliding-scale plan. The Court of Appeals of the District of Columbia so held by its majority decision in the case below. While the specific question was not in issue, this Court, in *Vinson v. Washington Gas Light Company*, 321 U. S. 489, at 492, said that an arrangement adopted under the provisions of paragraph 18 "must operate under the supervision and regulation of the Commission, may be altered and amended, and may be terminated by the Commission."

The Petitioner states that the Commission had, prior to this proceeding, uniformly recognized that any sliding-scale arrangement might be terminated on reasonable notice by either party. The sliding-scale plan for the determination of electric rates does not contain any such provision. The plan referred to by the Petitioner is that for the determination of gas rates and that plan specifically provides that either party may give notice in writing of at least 90 days of its intention to withdraw from the plan. But the Petitioner did not give the Commission notice in the instant proceeding at any time of its intention to withdraw from the sliding-scale plan until it had awaited, hopefully, for the result of the Commission's findings.

The Petitioner argues that the difference in the opinions of Judges Edgerton and Miller and the indecision of Judge Clark, left the law indeterminable. In the majority decisions below the court said the Commission has authority under the specific language of paragraph 18 to alter or amend any orders authorized by the paragraph. Judge Miller took a different view. Certainly there was no indecision in the opinion of Judge Clark when he said the Petitioner's argument was clearly against the obvious intention of Congress in passing the provisions. (R. 647.) There was no indecision in the opinion of Judge Edgerton when he said the plain language of paragraph 18 answers the Petitioner's argument. (R. 645.) There is no indecision in the opinion of Judge Miller when

he said that a sliding-scale arrangement permitted by paragraph 18 must be entered into voluntarily by the utility. There was no indecision in the findings of Judges Edgerton and Clark that the judgment of the lower court should be affirmed in dismissing the Petitioner's appeal.

Confusion, if there be any, compounded by the confusion of Petitioner, does not state a ground for granting a writ of certiorari.

2. Paragraph 6 of the Act Does Not Establish a Formula for Determining a Rate Base.

The Petitioner's second question and its argument is premised upon the assumption that the proceeding before the Commission was a valuation proceeding and that paragraph 6 of the act (37 Stat. 978, Sec. 43-305, D. C. Code) lays down a formula for valuation. This was not a valuation proceeding to find value for the sake of valuation. It was an investigation of the sliding-scale arrangement consolidated with the annual rate investigation under that plan. (R. 1, 2.) Value was involved because the rate base is one of the principal elements of the plan.

This was not a proceeding instituted under the provisions of paragraph 6 of the act. The dissenting Judge found the investigation was proper procedure under paragraph 18 of the act. (R. 653.)

But paragraph 6 is not a valuation formula and does not set out a method for rate-making. In establishing the Commission, Congress seemed concerned that the Commission should be informed about the utilities to be regulated and that Congress have such information for any appropriate legislative purpose. The only use prescribed of the "information" to be found was to print it in the annual reports.

On page 11 of the petition, it is asserted that paragraph 6 of the act lists the "main components" of value, "principally original cost and current cost of reproduction." Paragraph 6 of the act does not contain the words "fair value," "value,"

or "rate base," as indicated by Judge Edgerton in footnote 11 on Record page 646 and as stated by Judge Clark on Record page 649. Nor does the paragraph indicate that information required to be found by the Commission is in accordance with the so-called elements of fair value particularized in *Smyth* v. *Ames*, 169 U. S. 466.

Judge Edgerton said there is nothing in paragraph 6 or elsewhere in the act to indicate that the matter set forth in paragraph 6 must be adopted as a rate base. (R. 646.) Judge Clark said the paragraph does not indicate that the information collected under it shall be employed for the purpose of setting rates. (R. 649.)

Not only does the Petitioner state that paragraph 6 lists the main components of fair value, but that the principal elements are original cost and current cost of reproduction. There is nothing in paragraph 6 or elsewhere in the act to give credence to any such assertion. Paragraph 6 enumerates a great many things that the Commission was required to ascertain. Rather than saying that the matters to be found are the principal components, or even components of value, Congress said whenever the "information" required by the paragraph is obtained it shall be printed in the Commission's annual report.

Among other things, paragraph 6 requires the Commission to determine outstanding stock, bonds, debentures, and indebtedness, and the amount, respectively thereof, the date when issued, to whom issued, to whom sold, and the price paid in cash, property, or labor, to find the disposition of proceeds, by whom the indebtedness was held and the amount due thereon, the floating indebtedness of the utility, credits due the utility, other property belonging to the utility, judicial or other sales of a public utility, its property or franchises, and the amounts and manner paid therefor, and taxes paid thereon, the gross and net income of every utility from all sources, the amounts paid for salaries to officers and wages paid to employees and the maximum hours of continuous service re-

quired of each class. This information does not sound like the elements of fair value, catalogued in *Smyth* v. *Ames*, *supra*. In that case, the court said that some of the things to be considered in determining value are (1) the amount expended in permanent improvements, (2) the market value of the company's bonds and stocks, (3) earning capacity of the property under particular rates prescribed by statute, and, (4) the sum required to meet operating expenses. None of these prime components in the *Smyth* v. *Ames* doctrine is required to be determined in paragraph 6.

The Petitioner says on page 11 of its petition that paragraph 6 crystallized in a legislative formula the pronouncements in *Smyth* v. *Ames*. If so, it is difficult to understand why Congress did not crystallize the four items hereinabove enumerated which the court thought were of such importance in determining fair value. If paragraph 6 lays down a formula, did Congress intend to strike down these elements of value?

The answer is that Congress did not establish, and did not intend to establish, in paragraph 6 a rate formula or even a guide in the determination of rates. This may be illustrated by the report made by the Board of Commissioners of the District of Columbia shown in Senate Report No. 300, 62nd Congress, Second Session referred to by the Petitioner on page 12 of the petition. The significant fact about that report is that it was a report on S. 3812, 62nd Congress, Second Session, which bill, at the time the report was made, contained in section 6 thereof a provision to "ascertain the fair value" of each utility. But in paragraph 6 of the act approved by Congress, that language was deleted. If this has any significance, it is that Congress purposely deleted those words from paragraph 6.

Accrued depreciation and annual charges for depreciation are among the most important elements in valuation and rate-making, and are of particular importance in the fair value doctrine of *Smyth* v. *Ames*. But paragraph 6 is absolutely silent on the question of depreciation. The rate of return

is also an important element in rate-making and if paragraph 6 crystallized in a legislative formula the fair value theory, it is difficult to understand why the formula did not include the element of accrued depreciation and the matter of a fair rate of return.

Paragraph 7 of the act (Sec. 43-306, D. C. Code, 37 Stat. 978) is a valuation provision. It provides that the Commission shall value used and useful property at the fair value thereof at the time of said valuation. Paragraph 8 sets out the procedure for valuation. The provisions are that the utility shall have notice of at least 30 days and a public hearing. Paragraph 6 does not provide for notice or public hearing to ascertain the "information" to be printed in the Commission's annual report.

There is a stronger indication in the first paragraph of paragraph 64 of the act (App. Page 1) that Congress did not establish a formula and did not intend to establish a formula for rate-making. There Congress provided that if at any time the Commission shall be in doubt of the elements of value to be considered in "arriving at the true valuation" under the act it is authorized to institute a proceeding in court, petitioning the court to instruct the Commission as to the element or elements of value to be considered. (App. 1.) If paragraph 6 laid down the main components of fair value, and if original cost and cost of reproduction are the principal elements, then there is no reason why the Commission should go to the court for instructions as to the element or elements to be considered. If paragraph 6 established a legislative formula, the court was without authority to instruct the Commission to disregard that formula.

The first paragraph of paragraph 64 of the act provides that in a proceeding for instructions as to the element or elements of value to be considered the particular utility under valuation at the time shall be made a party defendant in the said action. Paragraph 6 does not provide that a utility must be made a party to any proceeding under it. It requires neither

notice nor hearing. The enactment of these provisions of paragraph 64 is a clear indication that Congress itself recognized it had not established a formula for rate-making and had not listed in paragraph 6 the principal components of fair value. Paragraph 64 indicates that the elements to be considered in valuation shall result in a "true valuation." Even assuming that a cost of reproduction estimate is evidence of value, it is that and nothing more.

A reproduction estimate is not an end sought, but merely one means of attempting to find value. Since the ultimate is the determination of the value, if there is better evidence than reproduction estimates, it should be used. In the instant proceeding, the Commission had the actual cost of the property, which was unchallenged. Having the best evidence, there was no occasion to revert to secondary evidence of a speculative and conjectural character. Fair value so found meets the requirements of paragraph 7 of the act and all constitutional requirements.

The cases cited by Petitioner in footnotes 10 and 11 on pages 12 and 13 of its petition do not support the argument that the Court of Appeals of the District of Columbia, nor this Court, has decided that the act requires a finding of current cost of reproduction. In the cases cited in footnotes 10 and 11, the Commission considered reproduction cost as an element of value. In *Potomac Electric Power Co.* v. *Public Utilities Commission,* 51 App. D. C. 77, 276 Fed. 327, and *Public Utilities Commission* v. *Capital Traction Company,* 57 App. D. C. 85, 17 F. (2d) 673, the construction of paragraph 6 was not involved. In both cases the Commission had considered reproduction cost, but instead of considering the reproduction cost as of the date of the valuation, it had, in each instance, used such cost as of July 1, 1914. In these cases the Court of Appeals said the determination of cost as of 1914 did not meet the requirement to give weight to the then value of the property. The Chief Justice dissented in the *Potomac Power Company case.* Neither of those cases held

as a matter of law that reproduction cost estimate was a measure of value because that question was not before the court in either case.

The Petitioner argues that the majority decision below results in a misapplication of the decisions of this Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, and *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575, and thereby thwarts the statutory requirement of paragraph 6 of the act. In both of those cases this Court was construing the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717). Section 6(a) of that act provides that the Federal Power Commission may investigate and ascertain the actual legitimate cost of property, the depreciation therein and, when found necessary for "rate-making purposes," other facts which bear on the determination of such cost or depreciation and "the fair value of such property." Here is a section which clearly indicates that valuation and rate-making were involved. In the *Hope case*, at page 600, this Court said that in spite of the language there used, Congress had provided no formula by which the just and reasonable rate is to be determined. This view is clearly indicated by the decisions of this Court in those two cases in which two entirely different methods were used in determining the rate base, one on a reproduction cost basis and the other on original cost.

The Petitioner undertakes to show some possible ground for issuing a writ of certiorari by asserting that the decision of the Court of Appeals is in conflict with applicable decisions of this Court and is particularly serious because it sets aside a legislative purpose and undermines the administrative process. We believe the decision of the majority below is not in conflict with applicable decisions of this Court. From what has been said hereinabove, we believe it is clear that Congress has not laid down a legislative formula for rate-making and that the legislative purpose has not been thwarted.

The Petitioner also seeks to show a possible ground for issuing the writ by asserting that the decisions of the majority

in the court below may well lead to confusion and delay because several state statutes require valuation based upon reproduction cost estimates. There is not in the majority opinion below the confusion the Petitioner would lead this Court to believe. On both questions raised by the Petitioner, the majority were in agreement and, if in different language, answered the questions against the contention of the Petitioner. Both Judges Edgerton (R. 645) and Clark (R. 647) agreed that paragraph 18 gives the Commission power to alter or amend the sliding-scale plan. Both agreed (R. 646, Note 11, and R. 649) that paragraph 6 of the act does not require the Commission to predicate its finding of the rate base upon reproduction estimates. Both agreed that Petitioner had no cause to complain and that the decision of the District Court should be affirmed.

The decision of the Court of Appeals interpreted a statute of only local interest and application. The act involved applies to no other jurisdiction than the District of Columbia. Paragraph 7 of the act requires the Commission to value the property used and useful for the convenience of the public "at the fair value thereof at the time of said valuation." That was done. The Commission found the value as of December 31, 1943 (R. 21, 42). Judge Clark so found. (R. 650.) The construction of a local statute can hardly lead to confusion and delay in the application of state statutes.

Question 2 is not of such character and of such importance as to justify review.

3. The Questions Presented are not Such as to Justify Review.

The questions presented on page 2 of the petition briefly stated are: 1. Does paragraph 18 authorize the Commission to alter or modify the sliding-scale plan without the consent of the Petitioner? 2. Does paragraph 6 of the act require the Commission to fix a rate base predicated in major part upon reproduction cost estimates?

While the language of the questions is far different from that stated hereinabove, they are in essence and without confusion here simply stated.

The decisions of the majority in the court below are not in conflict with other decisions of that court nor applicable decisions of this Court. Both Judges Edgerton and Clark agreed that the Commission has authority under paragraph 18 of the act to alter or amend the sliding-scale plan. That decision is not in conflict with any other decision interpreting the statute. It is in accord with what this Court said in *Vinson* v. *Washington Gas Light Co., supra.* Both agreed that paragraph 6 does not establish a legislative formula and that the Commission had authority to determine the rate base without consideration of reproduction estimates. Both agreed, as the Petitioner admits on page 7 of its petition, that matters of procedure short of confiscation, were unimportant. (R. 645, 650.) Both agreed that the Petitioner was not harmed by the Commission's order.

These decisions are not such as justify a review on certiorari. The questions presented by the Petitioner are not those stated by this Court in sub-paragraph 5 of Rule 38 as indicative of reasons for review. They do not raise questions of such importance as to justify the issuance of a writ of certiorari.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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APPENDIX

The first paragraph of paragraph 64 of the act creating the Public Utilities Commission (Sec. 43-704, D. C. Code, 1940 Ed.; 37 Stat. 988) reads as follows:

> "Par. 64. That if at any time the commission shall be in doubt of the elements of value to be by them considered in arriving at the true valuation under the provisions of this section, they are authorized and empowered to institute a proceeding in equity in the District Court of the United States for the District of Columbia, petitioning said court to instruct them as to the element or elements of value to be by them considered as aforesaid, and the particular utility under valuation at the time shall be made party defendant in said action."

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No. 1038

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF IN OPPOSITION

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DIVISION OF PRINTING AND PUBLICATIONS—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion and order of the Public Utilities Commission (R. 1) are reported in 55 P. U. R. (N. S.) 65. The findings and order of the District Court of the United States for the District of Columbia (R. 261 and 262) are not reported.

The opinion of the United States Court of Appeals for the District of Columbia (R. 641) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (R. 657) was entered on July 16, 1946. Petition for rehearing was filed on December 14, 1946 (R. 658), and denied on December 17, 1946 (R. 669). The petition for writ of certiorari was filed in this Court on February 17, 1947. The jurisdiction of this Court is contained in Sec. 8, Par. 65, of the Act of March 4, 1913, 37 Stat. 989, ch. 150, as amended by Sec. 2 of the Act of August 27, 1935, 49 Stat. 882, ch. 742 (Section 43-705, D. C. Code, 1940 ed.), and in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938, c. 229; U. S. Code, 1940 ed., Title 28, Section 347(a)).

STATUTE INVOLVED

The statute involved is set out in pertinent part in the appendix of the petition for writ of certiorari.

SUMMARY OF ARGUMENT

This case does not present any of the questions upon which this Court ordinarily grants a writ of certiorari. Although the Commission held a full hearing on proper notice, although Par. 62 of the statute (Sec. 43-702, D. C. Code, 1940 ed.) expressly authorizes the Commission to rescind or amend any rate order, and although Par. 62 of the statute specifically vests full authority in the Commission to change rates and regulations which have been embodied in a mutual agreement regarding a sliding scale, petitioner nevertheless contends that the order of the Commission is invalid because of the manner in which it was adopted.

No contention is made that the order is in violation of the due process clause of the Fifth Amendment. Petitioner does not

allege that the order of the Commission resulted in confiscation of its property and its position with respect to the method employed by the Commission in arriving at its order is therefore untenable.

The findings of fact of the Commission are not unreasonable, arbitrary or capricious; therefore, they are conclusive.

The petition constitutes nothing more than a request for another hearing.

ARGUMENT

I

The petition should be denied.

The statute involved is limited in its operation to the District of Columbia. This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia which are based upon statutes limited in their operation to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702, 64 S. Ct. 406, 88 L. Ed. 408; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, 56 S. Ct. 190, 80 L. Ed. 229. Certiorari was granted in *Vinson* v. *Washington Gas Light Co.*, 321 U. S. 489, 88 L. Ed. 883, 64 S. Ct. 731, "at the instance of the Director of Economic Stabilization and the Administrator, Office of Price Administration, of the United States" (p. 491).

The case does not involve a question of general importance or a question of substance relating to the construction or application of the Constitution, or a treaty of the United States, which has not been, but should be, settled by this Court. The petitioner does not question the constitutionality of the statute. The case does not involve a statute of the United States which should be settled by this Court although the statute involved was enacted by the Congress of the United States. All statutes in force and effect in the District of Columbia

are enacted by Congress in the exercise of that power expressly delegated to it by Article I, Section 8, Clause 17, of the Constitution. Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. When acting thus, Congress acts as a legislature of national character. *Cohens* v. *Virginia*, 19 U. S. 264, 6 Wheat, 264, 5 L. Ed. 257. However that may be, the statute is not national in its operation.

II

The rate established by the Commission is not confiscatory but is just, reasonable and nondiscriminatory.

The Court of Appeals points out that—

> "It is scarcely necessary to say that the impact of this order upon the Company produces no arbitrary result. The Company does not even question the finding of the District Court that the rates required by the order are just and reasonable." (R. 645)

This Court has said:

> "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. * * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. * * * And he who would upset the rate order under the Act carries the heavy burden of mak-

ing a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602, 64 S. Ct. 281, 88 L. Ed. 333.

III

The Court of Appeals for the District of Columbia has given proper effect to an applicable decision of this Court.

This Court granted certiorari in *Vinson* v. *Washington Gas Light Co., supra,* to review a rate order of the Public Utilities Commission of the District of Columbia. The Court said:

> "If we consider the petitioners' present position we find that the Commission heard all evidence offered, and says it weighed it. * * * In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing." (P. 500)

In the case at bar the Court of Appeals gave proper effect to that decision. The order in controversy did not abandon the sliding scale but only modified it after a full hearing, notice of which provided that the Commission had ordered an investigation to be made to determine:

1. Whether the sliding-scale method of electric rate regulation shall be abandoned.
2. Whether the sliding-scale method of electric rate regulation shall be continued in its present form or with modifications of the basic elements of the existing arrangement.
3. Without limiting the scope of the investigation, what modifications, if any, shall be made in the following basic elements of the present sliding-scale arrangement:

(a) The rate base.
(b) Rate of return.
(c) Depreciation accruals.
(d) Method of effecting rate reductions. (R. 1)

That the court below fully considered these criteria in the case at bar seems clear from the following statement from the concurring opinion of Mr. Justice Clark:

"* * * First, a valuation was made under the consent decree of 1924. Presumably, since no objection was raised, that valuation was considered to be proper at that time. There is nothing in the Act which would, in my opinion, preclude the carrying forward of that valuation, under an accounting pattern providing for accessions; and there is nothing in the Act to direct the Commission to make a new 'valuation' whenever an amendatory regulation was promulgated under the 'sliding-scale' plan. Quite apart from this consideration, we have the question of the nature and purpose of the hearing which resulted in Order No. 2796. It was not only broad enough to cover a valuation proceeding, but the Commission did in fact take valuation evidence into account. Both the Commission and the United States presented valuation data, and the Company cannot be heard to say that it did not know that it too could come forward with such evidence as it deemed pertinent in this regard. If it was not satisfied with the evidence presented to the Commission it had the burden of making out its own case. This the Company failed to do, and in my opinion the Commission was properly within the requirements of the law in making such adjustments as it did and establishing the so-called 'new' valuation on the basis of the best evidence before it on the date stated, December 31, 1943."

IV

Since the findings of fact of the Commission are not unreasonable, arbitrary or capricious, they are conclusive.

Par. 66 of the statute (Sec. 43-706, D. C. Code, 1940 ed.; Petition appendix, page 5) provides that:

> "In the determination of any appeal from an order or decision of the commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the commission shall be conclusive unless it shall appear that such findings of the commission are unreasonable, arbitrary or capricious."

In its essentials, the order complained of constitutes the finding of an ultimate fact. It is submitted that the order has warrant in the record and a reasonable basis in the law. *Cf. Dobson* v. *Commissioner*, 320 U. S. 489, 88 L. Ed. 248, 64 S. Ct. 239.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 1038

In the Supreme Court of the United States

OCTOBER TERM, 1946

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

The United States, in its capacity as a consumer, was a party to the proceeding before the Public Utilities Commission of the District of Columbia in which the Commission issued its Order No. 2796, requiring the Potomac Electric Power Company (Pepco) to reduce its rates by $1,037,189. For the reasons stated in the petition herein, Pepco contended that the order was invalid *in toto*. The United States contended that the reduction which was ordered was inadequate. After their applications for reconsideration were denied by the Commission, the United States, as

an "affected person," and Pepco each instituted, in accordance with Paragraph 65 of the District of Columbia Utility Law (D. C. Code 43–705), a proceeding in the United States District Court for the District of Columbia objecting to Order No. 2796 and seeking judicial review thereof. Each intervened in the proceeding brought by the other. These proceedings were consolidated for many purposes. The District Court ordered the dismissal of the complaint in each case and, upon appeal, the Court of Appeals for the District of Columbia in separate opinions affirmed Order No. 2796 in all its aspects, rejecting the objections thereto raised by Pepco and by the United States.

Although the United States takes the position that the court below properly overruled the objections of petitioner Pepco to Order No. 2796 in the instant case, it believes that the court committed serious error, which requires correction by this Court, in overruling the objections to the order which were interposed by the United States in the companion case. Accordingly, the United States is filing a petition for a writ of certiorari to review the judgment of the Court of Appeals rejecting its objections to Order No. 2796. As will appear from the petition, it is believed that the questions there raised are of sufficient novelty and public importance to merit consideration by this Court. Since the issues presented by the

United States and by petitioner Pepco relate to the same administrative order and involve the construction of the same statute on substantially identical records, the United States would not, if the petition of the United States is granted in the companion case, oppose granting the petition for a writ of certiorari in this case.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MARCH 1947.

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